Supreme Court, U. S.
FILED
FEB 2 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1201

MOBIL OIL CORPORATION,

Appellant,

—vs.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

JURISDICTIONAL STATEMENT

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
MOBIL OIL CORPORATION
150 East 42nd Street
New York, New York 10017
(212) 883-4965

Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

February 1, 1979

TABLE OF CONTENTS

PAGE

Jurisdictional Statement 1

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Questions Raised Below 3

Constitutional and Statutory Provisions Involved 4

Statement of the Case 4

The Questions Are Substantial 6

ARGUMENT—

I. The Tax on Appellant's Dividends Violates the Due Process Clause, Because There Is No Connection Between Its Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed 9

II. The *Moorman* Case Should Not Be Extended to Permit Multiple Taxation of Dividends Paid Out of Foreign Earnings, Because to Do So Would Be Repugnant to the Foreign Commerce Clause and Incompatible With Established Congressional Policy. The Vermont Tax Should Be Invalidated Under the Foreign Commerce Clause 11

CONCLUSION 21

PAGE

APPENDIX A—

Determination of Appeal 1a

APPENDIX B—

Superior Court Order and Final Order 14a

APPENDIX C—

Vermont Supreme Court Opinion and Order 19a

APPENDIX D—

Notice of Appeal 32a

APPENDIX E—

Vermont Statutes Involved 35a

APPENDIX F—

Allocation or Apportionment of Dividends Included in the Tax Base 37a

TABLE OF AUTHORITIES

Cases:

Austin v. *New Hampshire*, 420 U.S. 656 (1975) 17

Brolan v. *United States*, 236 U.S. 216 (1915) 12

Chestnut Securities Co. v. *Oklahoma Tax Commission*, 125 F.2d 571 (C.A. 10th 1942), cert. denied, 316 U.S. 668 (1942) 18

Complete Auto Transit, Inc. v. *Brady*, 430 U.S. 274 (1977) 16

Curry v. *McCanless*, 307 U.S. 357 (1939) 19

PAGE

Epstein v. *Lordi*, 261 F. Supp. 921 (D.C. N.J. 1966), aff'd 389 U.S. 29 (1967) 12

Evco v. *Jones*, 409 U.S. 91 (1972) 11

Frick v. *Pennsylvania*, 268 U.S. 473 (1925) 9, 11

General Motors Corp. v. *Washington*, 377 U.S. 436 (1964) 16

General Trading Co. v. *State Tax Commission*, 322 U.S. 335 (1944) 15, 17

Hines v. *Davidowitz*, 312 U.S. 52 (1941) 15

International Harvester Co. v. *Department of Treasury*, 322 U.S. 340 (1944) 15, 16, 17

International Harvester Co. v. *Evatt*, 329 U.S. 416 (1947) 16

International Harvester Co. v. *Wisconsin Dept. of Taxation*, 322 U.S. 435 (1944) 19

McGoldrick v. *Berwind—White Coal Mining Co.*, 309 U.S. 33 (1940) 16

McGoldrick v. *Gulf Oil Corporation*, 309 U.S. 414 (1940) 15

McLeod v. *Dilworth Co.*, 322 U.S. 327 (1944) 15, 17

Michelin Tire Corp. v. *Wages*, 423 U.S. 276 (1976) 12

Michigan-Wisconsin Pipe Line Co. v. *Calvert*, 347 U.S. 157 (1954) 11

Miller Bros. Co. v. *Maryland*, 347 U.S. 340 (1954) 9, 11

Moorman Manufacturing Co. v. *Bair*, 437 U.S. 267 (1978) 6, 10, 11, 14, 15, 16

National Bellas Hess, Inc. v. *Department of Revenue*, 386 U.S. 753 (1967) 11

PAGE

National Geographic Society v. *California Board of Equalization*, 430 U.S. 551 (1977) 16
Norton Co. v. *Department of Revenue*, 340 U.S. 534 (1951) 9
Northwestern States Portland Cement Co. v. *Minnesota*, 358 U.S. 450 (1959) 16

Pacific Telephone and Telegraph Company v. *Franchise Tax Board*, 102 Cal. Reptr. 782, 498 P.2d 1030 (1972) 18

Southern Pacific Company v. *McColgan*, 68 Cal. App. 2d 48, 156 P.2d 81 (1945) 18

Treichler v. *Wisconsin*, 338 U.S. 251 (1949) 11

United Gas Corporation v. *Fontenot*, 241 La. 488, 129 So.2d 748 (1961) 18

Western Live Stock v. *Bureau of Revenue*, 303 U.S. 250 (1938) 16, 17
Wisconsin v. *J.C. Penney Co.*, 311 U.S. 435 (1940) 19

Statutes:

Internal Revenue Code
§243 ..... 5, 6
§245 6
§§901-902 6

Kentucky Revised Statutes
§141 7

Michigan Compiled Laws
§208 7

PAGE

Missouri Revised Statutes
§143 7

New York City Administrative Code, Ch. 46
Tit. A 21
Tit. L 20
Tit. R 20

New York Tax Law
Art. 9-A 20
Art. 28 21

Purdon's Pennsylvania Statutes Annotated
Title 72 7

Revenue Acts of 1918-1939 13

West Virginia Code
§11-24-6 7

Vermont Statutes Annotated, Title 32
§5811(18) 4, 5, 6
§5833 4

Constitution:

Commerce Clause, United States Constitution Article I, Sec. 8, cl. 3 ..... 2, 3, 4, 6, 7, 11, 12, 15, 16, 19, 20

Due Process Clause United States Constitution, Amendment XIV 2, 3, 4, 6, 9, 11, 19

Privilege And Immunities Clause, United States Constitution, Article IV, Sec. 2 17

Other Authorities:

Carlson, State Taxation of Corporate Income From Foreign Sources, Essays in International Taxation: 1976, Department of the Treasury, Washington, D.C. 7

PAGE

Dexter, Taxation of Income From Intangibles of Multistate and Multinational Corporations, 29 Vand.L. Rev. 400 (1976) 18

Governmental Finances in 1976-1977, Bureau of Census, U.S. Dept. of Commerce (GF 77, No. 5) 20

Hartman, State Taxation of Corporate Income from a Multistate Business, 13 Vand.L.Rev. 21 (1959) 17

Hearings, Senate Finance Com., Tax Reform Act of 1969, Part 6, p. 5088 [91st Cong. 1st Sess. Oct. 3, 1969] 13

House Ways and Means Committee Report, Revenue Bill of 1934 (H.R.Rep. No. 704, 73rd Cong., 2d Sess. Dec. 4, 1933) 15-16 13

Internal Revenue Service, Statistics of Income—1973, Corporation Income Tax Returns, U.S. Government Printing Office (1977) 8

State Taxation of Interstate Commerce, Report of Special Subcommittee on State Taxation of Interstate Commerce, House Judiciary Committee (88th Cong. 2d Session H.R. No. 1480) Vol. 1, p. 204 18

Watson, Allocation of Business Income for State Income Tax Purposes, 25 Minn.L.Rev. 851 (1941) 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. .....

MOBIL OIL CORPORATION,

Appellant,

—VS.—

COMMISSIONER OF TAXES OF VERMONT,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF VERMONT

JURISDICTIONAL STATEMENT

Mobil Oil Corporation, the appellant, appeals from the final decree of the Supreme Court of Vermont, dated November 9, 1978, holding that the Vermont income tax may be applied to appellant's dividend income derived from earnings outside the United States.

Opinions Below

The findings of fact and conclusions of law by the Commissioner of Taxes of the State of Vermont are found in the Commissioner's Determination of Appeal, dated April 11, 1974, which is set forth in Appendix A; the determination is unreported. The opinion of the Washington County Superior Court reversing the Commissioner's determination and holding in favor of the appellant is contained in that court's order, dated January 6, 1977 and the court's

final order, dated June 9, 1977, which are set forth in Appendix B; the orders are unreported.

The decision from which this appeal is taken is the order of the Vermont Supreme Court reversing the decision of the Superior Court. The order and opinion of that court, which are set forth in Appendix C, have not yet been reported. Notice of appeal (Appendix D) was filed in the Washington Superior Court, the court possessed of the record, on January 19, 1979.

Jurisdiction

The final decree of the Vermont Supreme Court was filed on November 9, 1978. This appeal is being docketed within 90 days from that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(2).

Questions Presented

Whether the Due Process Clause of the Fourteenth Amendment or the Commerce Clause of the Constitution of the United States is violated by a State income tax imposed on dividends received by a corporation organized under the laws of a sister State in which the corporation maintains its commercial domicile, where:

(1) the dividends were received and their control, use and disposition were managed and directed, and the capital stocks on which the dividends were paid were held, managed and controlled by the corporation from its offices outside the taxing State;

(2) the dividends were derived from foreign source earnings of the payor corporations; and

(3) the only connection between the recipient corporation and the taxing State was the sale of products in that State.[1]

Questions Raised Below

The Due Process and Commerce Clause issues were raised by appellant in the administrative proceeding before the Vermont Commissioner of Taxes (P.C. 8-10), in its appeal to the Washington Superior Court (Opinion, App. B, p. 14a, and Appellant's Brief therein), and before the Vermont Supreme Court.[2] The Vermont Supreme Court said in its opinion, "As the superior court correctly noted in its order, the legal questions concerning apportionment and due process had already been answered adversely to Mobil's contentions by recent decisions of this Court", and went on to reverse the holding of the Washington Superior Court that the tax on appellant's dividends violated the Commerce Clause. (App. C, p. 22a).

---

[1] The decision below also dealt with the inclusion in the tax base of interest income. Because of the comparatively small amount of interest involved and appellant's desire to simplify the issues, this appeal is restricted solely to the dividend issue.

[2] In its brief filed in the Vermont Supreme Court, appellant [there the appellee] stated: "Mobil also contended below that the inclusion in the apportionable base of the dividends and interest at issue is contrary to §5833(a) and that such inclusion would constitute extraterritorial taxation, in violation of the Due Process Clause. Because this court has rejected essentially the same contentions in the *F. W. Woolworth* and *Goodyear cases, supra,* they are not being reargued in this brief. The appellee is not, however, waiving those contentions, but is reserving them for any further possible steps in this proceeding." (P. 6).

Constitutional and Statutory Provisions Involved

Commerce Clause (Art. I, §8, cl. 3):

> "The Congress shall have power . . . to regulate commerce with foreign Nations and among the several States, and with the Indian Tribes;"

Due Process Clause (Amend. XIV, §1):

> "[N]or shall any State deprive any person of life, liberty, or property, without due process of law;"

The pertinent sections of of the Vermont Statutes Annotated, Title 32, sections 5811(18) and 5833, are set forth in Appendix E.

Statement of the Case

During the years at issue, 1970, 1971 and 1972, appellant, a New York corporation, (Stipulation of Facts ["Stip"] ¶1, Supplemental Printed Case ["SPC"]—30), was engaged in the United States in the petroleum business, including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products, and in chemical and related mining businesses (Stip. ¶6, SPC—32). Appellant was engaged in interstate and foreign commerce. (Stip. ¶8, SPC—33). Appellant was subject to net income taxes or franchise taxes measured by net income imposed by Vermont and some 40 other States and the District of Columbia. (Stip. ¶8, SPC—33).

Appellant's corporate headquarters, principal place of business and commercial domicile were in New York City. (Stip. ¶7, SPC—32 and 33; App. A, p. 2a). Its only activity in Vermont was the wholesale and retail marketing of petroleum products and related products. (Stip. ¶9, SPC—33).

It had no oil or gas production or refineries in the State. (*Ibid.*)

Appellant owned the capital stocks of a large number of domestic and foreign corporations;[3] dividends were the major source of the appellant's taxable income. (*Id.* p. 5). In all respects, appellant's business as the owner of the stocks was conducted, managed and directed at the company's offices outside the State of Vermont. (Stip. ¶¶7 and 11, SPC—32-34). All dividends were received outside Vermont, and appellant's control and use of the dividends were managed and directed from its offices outside that State. (*Ibid.*) More than 99% of the dividends at issue were received by appellant from corporations deriving all, or all but an insignificant portion, of their income from sources outside the United States. (Stip. ¶26, SPC—39).

The assessment in controversy is based on the inclusion in the tax base, before apportionment, of 15% of the dividends received by appellant from domestic non-subsidiary corporations, in amounts ranging from approximately $17,800,000 to $25,900,000 for the years at issue, and 100% of the dividends received from subsidiaries and non-subsidiaries organized under the laws of foreign countries, in amounts ranging from approximately $156,000,000 to $264,000,000 (Ex. 8).[4]

---

[3] The term "domestic" corporation refers to a corporation organized under the laws of one of the States, and "foreign" corporation to a corporation organized under the laws of a foreign country.

[4] The Vermont income tax law conforms to the Federal corporation income tax rules by excluding from the tax base, before apportionment, all dividends received from 80% or more owned domestic U.S. corporations and 85% of the dividends received from such corporations that are less than 80% owned (subject to technical qualifications). (IRC § 243, Vt. § 5811(18), App. E, p. 35a). The State law also follows the Federal rule of including in the tax measure all the dividends received from corporations organized

The Questions Are Substantial

The following substantial Federal constitutional questions are presented by this appeal:

(1) This Court has never decided whether a State may impose an income tax on dividends received by a corporation that does business in the State, but is organized under the laws of a sister State in which its commercial domicile is located, where the dividends included in the apportionable base of the tax are received from stocks that are held, managed and controlled, and the dividends are received and the control, use and disposition of the dividends are managed and directed entirely outside the taxing State. Appellant contends that the Vermont tax on such dividends constitutes extra-territorial taxation in violation of the Due Process Clause.

(2) This case raises the question as to whether the recent decision of *Moorman Manufacturing Co.* v. *Bair* (437 U.S. 267 [1978]), in which this Court declined to intervene in a State tax apportionment challenged under the Due Process and Commerce Clauses, should be extended to dividends paid out of earnings derived from foreign sources, particularly in view of the long established Congressional policy of avoiding double taxation of foreign source income.

(3) In rejecting the Commerce Clause challenge to the tax at issue, the Vermont Supreme Court held that proof

---

under the laws of foreign countries (with exceptions not here applicable) (IRC §§243, 245, Vt. *ibid.*). Unlike the Federal income tax, the Vermont tax grants no credits for foreign income taxes paid either by the taxpayer or by a dividend paying foreign corporation, 10% or more of whose stock the taxpayer owns. (IRC §§ 901-902, Vt. *ibid.*).

of actual multiple taxation is a *sine qua non* to the invocation of the multiple taxation doctrine, whereas appellant contends that the test of prohibited multiple taxation lies in the power of various States to tax, regardless of whether that power has been exercised. The view expressed by the Vermont court threatens to undermine the cornerstone of this Court's approach to State taxation under the Commerce Clause during the past 40 years.

The taxation of dividends by the States is a matter of major fiscal importance to corporations engaged in interstate or foreign commerce, as well as to the States. There are 40 States and the District of Columbia that impose corporate taxes measured by net income which include dividends in the tax base.[5] Many of the States follow the Federal income tax rule of including in the measure of the tax 15% of the dividends received from domestic corporations that are less than 80% owned, and 100% of the dividends from foreign corporations.[6] It has been estimated that foreign source dividend income in the amounts of $2,200,000,000 from subsidiaries and $520,000,000 from non-subsidiaries was included in the corporate tax base of the States in 1972.[7]

The rules currently being applied by the various States for allocating or apportioning the dividends they include

---

[5] See Appendix F. In addition to the 40 States enumerated in the table, Kentucky, Michigan, Missouri, Pennsylvania and West Virginia also impose income taxes but they do not include any dividends in the tax base. See Ky. Rev. Stat. §141, CCH 10-400, 410; Mich. Comp. Laws §208, CCH 15-300, 304; Mo. Rev. Stat. §143, CCH 10-400, 435; Pa. Stat. Ann. Tit. 72, CCH 10-700; W. Va. Code §11-24-6, CCH 10-700, 715.

[6] Carlson, "State Taxation of Corporate Income From Foreign Sources", in *Esays In International Taxation: 1976*, Department of the Treasury, Washington, D.C. (1976), pp. 284-301.

[7] *Id.* at 266.

in the tax base vary sharply State to State.[8] Some States allocate all taxable dividends to the State if the corporation's commercial domicile is there located; otherwise the dividends are not taxed.[9] In other States, the same rule of allocation to the commercial domicile is followed if the dividends constitute "non-business" income, but if classified as "business" income, the dividends are apportioned even though the taxpayer's commercial domicile is located in another State.[10] A number of other States, including Vermont, apportion all dividends under their formulas, regardless of the location of the taxpayer's commercial domicile.[11] These and other variations in the current State patterns of taxing dividends[12] make it apparent that a large number of corporations engaged in interstate or foreign commerce are subject to risks of multiple State taxation of substantial amounts of dividends derived from foreign source earnings.[13]

---

[8] 40 States and the District of Columbia levy a tax on intercorporate dividends in whole or in part. Three of these States do not tax intercorporate dividends from foreign corporations which are paid from foreign source income. See App. F, p. 37a.

[9] Seven States fall into this category. See App. F, p. 37a.

[10] This is the method used by 18 States and the District of Columbia. *Ibid.*

[11] Eight States employ this apportionment principle. *Ibid.*

[12] Four other States apply a variety of disparate rules in attributing dividends to the State. *Ibid.*

[13] In 1973, more than 100,000 corporations reported net dividend income from foreign and domestic corporations on their Federal income tax returns. Internal Revenue Service, Statistics of Income —1973, Corporation Income Tax Returns, U. S. Government Printing Office (1977).

I

The Tax on Appellant's Dividends Violates the Due Process Clause, Because There Is No Connection Between Its Business, Property or Operations in Vermont and the Foreign Source Dividends Taxed.

(a)

Under the Due Process Clause, "while a State may shape its tax laws as to reach every object which is under its jurisdiction, it cannot give them extra-territorial operation". (*Frick* v. *Pennsylvania*, 268 U.S. 473, 489 [1925].) This Court has given "consistent adherence to one time-honored concept: that due process requires some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." (*Miller Bros. Co.* v. *Maryland*, 347 U.S. 340, 345 [1954]).

Here, since all of appellant's business and activities relating to its ownership, management and control of its stocks and the dividends they produced, were carried on outside the taxing State, the "definite link" or "minimum connection" required by the Due Process Clause to sustain the Vermont tax is missing. Moreover, there is no nexus between Vermont and the underlying earnings out of which the dividends were paid, since the payor corporations conducted no business, maintained no offices or employees, owned or leased no property, and derived no income from sources within the State. (Stip. ¶¶25-27, SPC—39).

The fact that appellant engages in the wholesale and retail marketing of products in Vermont does not warrant taxation of the income from its holding company and investment business conducted entirely outside the State. In *Norton Co.* v. *Department of Revenue* (340 U.S. 534, 537 [1951]), the Court stated:

> ". . . when, as here, the corporation has gone into the State to do local business by state permission and has submitted itself to the taxing power of the State, it can avoid taxation on some Illinois sales only by showing that particular transactions are disassociated from the local business and interstate in nature."

The requisite showing has been made in the instant case. All transactions and all of appellant's activities and operations having to do with the stocks and the dividends at issue were entirely disassociated from appellant's business in Vermont. On these facts, Vermont has no constitutional basis for taxing the dividends at issue.

(b)

Moorman Manufacturing Co. v. *Bair, supra,* is not inconsistent with the contention here being made, for that case dealt with a challenge to the State's method of apportioning admittedly taxable income. In *Moorman* the income arose from selling and warehousing carried on in the State, the taxability of which was conceded; the controversy related to Iowa's method of apportionment. The appellant in the instant case has no quarrel with Vermont's apportionment method, but instead makes the contention not at issue in *Moorman* that the State lacks jurisdiction under the Constitution to tax, or include the dividends in the tax base, under any method of apportionment. Indeed, in *Moorman* Iowa did not include in the taxable base or in the apportionment, the taxpayer's dividend income. (437 U.S. at 269).

While this Court has generally abstained from intervening in taxpayers' challenges to State methods of apportionment, except in the most flagrant cases, *Moorman* being the most recent and most articulate enunciation of

that policy, the Court has followed a different policy in dealing with jurisdiction of the States to tax. When it has been confronted with taxpayers' challenges to the power or jurisdiction of a State to tax, whether under the Due Process or the Commerce Clause, this Court has always recognized its constitutional role as arbiter between taxpayers and the various States.[14] Accordingly, the doctrine of the *Moorman* case has no bearing on the Due Process issue here raised.

II

The *Moorman* Case Should Not Be Extended to Permit Multiple Taxation of Dividends Paid Out of Foreign Earnings, Because to Do So Would Be Repugnant to the Foreign Commerce Clause and Incompatible With Established Congressional Policy. The Vermont Tax Should Be Invalidated Under the Foreign Commerce Clause.

(a)

The *Moorman* case does not govern the Commerce Clause issue in the instant case, because taxation of foreign commerce presents different considerations from those involved in taxation of interstate commerce.

The primacy and predominance of the Federal Government in dealing with the country's foreign relations, including commerce with other countries, is so well established as to require little more than a statement of the principle. As this Court recently stated, in passing on the validity of a State property tax on goods imported into this country, "The Federal Government must speak with

---

[14] Frick v. Pennsylvania, 268 U.S. 473 (1925); Treichler v. Wisconsin, 338 U.S. 251 (1949); Miller Bros. Co. v. Maryland, 347 U.S. 340 (1954); National Bellas Hess, Inc. v. Department of Revenue, 386 U.S. 753 (1967); Michigan-Wisconsin Pipe Line Co. v. Calvert, 347 U.S. 157 (1954); Evco v. Jones, 409 U.S. 91 (1972).

one voice when regulating commercial relations with foreign governments." (*Michelin Tire Corp.* v. *Wages*, 423 U.S. 276 [1976]). Consequently, decisions dealing with interstate commerce do not govern the distinctive issues arising when foreign commerce is at stake. As Chief Justice White declared, ". . . decisions of this court dealing with the power to regulate interstate commerce" do not govern questions arising under the Foreign Commerce Clause, because of "the broad distinction which exists between the two powers." (*Brolan* v. *United States*, 236 U.S. 216, 222 [1915]). A three Judge District Court has stated, ". . . when foreign commerce is involved the national interest is even more clearly paramount" than when State action affecting interstate commerce is involved. (*Epstein* v. *Lordi*, 261 F.Supp. 921, 931 [D.C. N.J. 1966], aff'd 389 U.S. 29 [1967]).

(b)

For decades, Congressional tax legislation has been based on the policy that foreign commerce conducted by United States based enterprises should be encouraged by eliminating double taxation of income from foreign sources. This has been done in part under the Federal income tax by granting to United States domestic corporations credits against income taxes paid to foreign governments. (I.R.C., §§901-904) The credit is granted not only for income taxes paid by the taxpayer to foreign governments, but it likewise extends to foreign income taxes paid by foreign corporations in which the taxpayer holds at least 10% of the voting stock (I.R.C., §902). This "indirect credit" comes into play at the time the income of the foreign corporation is paid or deemed paid to the United States corporation as a dividend. (*Ibid.*)

Double taxation of dividends paid by domestic corporations out of foreign source earnings is fully or partially

avoided under the Federal income tax by the general treatment of dividends from domestic corporations, whether based on United States or foreign source earnings. Dividends received from 80% or more owned domestic subsidiaries are entirely exempted from tax; and only 15% of the dividends received from less than 80% owned domestic corporations are taxed. (I.R.C., §243).

The Congressional policy of avoiding double taxation of foreign source earnings has been in force since the Revenue Act of 1918.[15] As characterized by the Treasury Department, the policy was designed "to avoid burdensome double taxation and to encourage foreign trade."[16] Under Secretary of the Treasury Stanley Surrey described the importance of the policy in the following words:

> "American investment would not proceed at all without the foreign tax credit because then, as the chairman pointed out, two taxes would be imposed and the overall burden of two taxes would be so great that international investment would practically cease."[17]

Because the States, unlike the Federal government, are not empowered to tax the global income of corporations (at least of corporations not domestic to the State), a different method of corporate income taxation is used by the States. Instead of granting foreign tax credits to avoid double taxation of income, the States utilize the allocation and

---

[15] See 1918, 1921, 1924 and 1926 Acts, §§222, 238; 1928, 1932, 1934, 1936, 1938 Acts, IRC (1939), §131; 1939 Act, §216 and the provisions of the IRC of 1954 cited in the text.

[16] House Ways and Means Committee Report, Revenue Bill of 1934 (H.R. Rep. No. 704, 73rd Cong., 2d Sess.) pp. 15-16.

[17] See Mr. Surrey's testimony before the Senate Foreign Relations Committee with respect to the United States—Brazil tax treaty, quoted in Hearings, Senate Finance Com., Tax Reform Act of 1969, Part 6, p. 5088 [91st Cong. 1st Sess. Oct. 3, 1969]).

apportionment method. In theory, this method is designed to tax only the income attributable to the State, and hence avoid overlapping State taxation of income. In practice, as the Court recognized in *Moorman*, multiple taxation often results from diverse allocation and apportionment techniques. Whether the *Moorman* principle of abstention by the Court from State tax apportionment and allocation issues should be extended to foreign source *operating* income of United States enterprises is not an issue posed by the case at bar. This case presents the narrower question as to whether *Moorman* should be extended to State taxation of foreign source *dividends*.

State taxation of dividends arising from foreign source earnings raises different questions from State taxation of direct operating income of a United States corporation arising from operations abroad. That is because, unlike the attribution of operating income, dividend income is allocated in toto by some States to the recipient's commercial domicile, whereas other States apportion dividend income in accordance with their formulas. (See App. F, p. 37a). Because no State allows a foreign tax credit against dividends, the consequence of these diverse and conflicting State rules is a clear and present danger of multiple State income taxation of dividends derived from foreign earnings.

(c)

In adjudging whether State legislation is invalid because it conflicts with Federal policy, this Court has not required a Congressional prohibition *in haec verba*. Instead, the standard used was stated as follows in a case passing on a Pennsylvania statute:

> "Our primary function is to determine whether . . . Pennsylvania's law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (*Hines* v. *Davidowitz*, 312 U.S. 52, 62 [1941]).

In *McGoldrick* v. *Gulf Oil Corporation*, (309 U.S. 414, 428-429 [1940]), in invalidating a local tax, the Court said that a "state tax . . . must fail as an infringement of the Congressional regulation of the commerce" if it violates "the purpose of the Congressional regulation".

There appears to be adequate basis for the invalidation of a State tax that subjects foreign source dividends to a risk of multiple taxation, on the ground that such taxation would conflict with the Federal tax policy designed to encourage foreign trade. Nevertheless, even if the Court does not make such a finding, it can conclude that, in view of the Federal policy, *Moorman* should not be extended to State tax allocation and apportionment of foreign source dividends.

Moreover, the Court in this case is not confronted with the necessity of prescribing a national uniform code of allocation and apportionment, as it indicated the taxpayer's position in *Moorman* would compel it to do. Here, the Court need only follow the precedent it has established in at least one other area of taxation under the Commerce Clause, namely, sales and use taxation, by holding that under the foreign Commerce Clause, one State and one State alone may tax dividends arising out of foreign source earnings.[18]

---

[18] The Court has sanctioned the power of the State of the buyer to impose on out-of-state vendors the duty to collect use taxes on sales of goods shipped from other States to customers within the State, while rejecting the power of the seller's State to tax such transactions. See Mr. Justice Rutledge's single opinion in McLeod v. Dilworth Co., 322 U.S. 327, 349, at 358, General Trading Co. v. State Tax Commission, 322 U.S. 335, and International Harvester

(d)

When this Court, beginning in the middle 1930's, swept away the traditional view that under the Commerce Clause "interstate commerce may not be taxed at all" and that the Commerce Clause created an area of trade free of State taxation, it by no means left the commerce unprotected, in the silence of Congress, from undue burdens of State taxation. In place of the tax-free haven doctrine, there was erected the multiple taxation doctrine, under which State taxes are held to conflict with the Commerce Clause, if they subject interstate or foreign commerce to a risk of multiple taxation not borne by intrastate commerce.[19]

The Vermont court has interpreted language in some of this Court's opinions as holding that proof of actual multiple taxation is a *sine qua non* to the invocation of the multiple taxation prohibition (App. C, p. 24a).[20] It is submitted that the Vermont court has misconstrued some passing statements in this Court's opinions. The multiple taxation doctrine as enunciated was unmistakably premised on the view that the validity of a State tax is determined in the light of the *power* of other States to tax interstate commerce, regardless of whether the power has been ex-

Co. v. Department of Treasury, 322 U.S. 340 (1944). As a consequence, interstate sales, like intrastate sales, are subject to tax, and the "out-of-state seller runs no risk of double taxation." National Geographic Society v. California Board of Equalization, 430 U.S. 551, 558 (1977).

[19] Western Live Stock v. Bureau of Revenue, 303 U.S. 250 (1938); McGoldrick v. Berwind-White Coal Mining Co., 309 U.S. 33 (1940); International Harvester Co. v. Department of Treasury, 322 U.S. 340 (1944); International Harvester Co. v. Evatt, 329 U.S. 416 (1947).

[20] The cases cited were the Moorman case; Complete Auto Transit, Inc. v. Brady, 430 U.S. 274, 278 (1977); General Motors Corp. v. Washington, 377 U.S. 436, 449 (1964); Northwestern States Portland Cement Co. v. Minnesota, 358 U.S. 450, 462-63 (1959).

ercised.[21] No other rule is viable or appropriate to the delineation of State powers of taxation under our Federal system. State taxing powers cannot be made to turn on a competitive race by the States in exercising their taxing powers. This Court recently reaffirmed that principle in holding unconstitutional, under the Privilege and Immunities Clause, New Hampshire's commuter's tax, by saying:

> "Nor . . . can the constitutionality of one State's statutes affecting nonresidents depend upon the present configuration of the statutes of another State." (*Austin* v. *New Hampshire*, 420 U.S. 656, 666 [1975]).

(e)

The decision below subjects appellant to a risk of multiple taxation not borne by intrastate commerce, because the State of a corporation's commercial domicile has long been recognized as having the constitutional power to tax dividends in full, and there is no legitimate constitutional basis for depriving it of that power. Allocation of dividends to the taxpayer's commercial domicile, based on the doctrine of *mobilia sequuntur personam*, was the traditional method used in State taxation.[22] Although the question has

[21] See Western Live Stock v. Bureau of Revenue, supra, 303 U.S. at 256, and Mr. Justice Rutledge's single opinion in McLeod v. Dilworth Co., 322 U.S. 327, 349, at 358 (1944), General Trading Co. v. State Tax Commission, 322 U.S. 335, and International Harvester Co. v. Department of Treasury, 322 U.S. 340.

[22] See the survey made in 1941 in Watson, "Allocation of Business Income for State Income Tax Purposes", 25 Minn. L. Rev. 851, 858-862. In a 1959 study, Professor Paul Hartman reported that of the 34 States then imposing corporate taxes measured by net income, specific allocation was provided by explicit provision in 15 of the States and the District of Columbia, in most cases to the State of the taxpayer's principal place of business or its domicile. "State Taxation of Corporate Income from a Multistate Business", 13 Vand. L. Rev. 21, 49, 59. In five other States the specific

never been decided by this Court, the power of the State of a corporation's commercial domicile to tax the corporation's dividends, without apportionment, has been sustained over the years by intermediate Federal and by State Courts.[23]

In recent years, a number of States have sought to apportion taxable dividends, including dividends derived from foreign source earnings, along with operating income.[24] If the apportionment utilized in this case by Vermont should not be reversed, multinational businesses would be subjected to a risk of multiple taxation of dividends from foreign source earnings. By way of contrast, a corporation conducting an intrastate business in a single State and receiving dividends from other corporations doing

---

allocation provisions were less clear, but the author regarded them as broad enough to include dividends; in eight States there were no specific allocation provisions. *Id.* at p. 61. See also "State Taxation of Interstate Commerce", Report of Special Subcommittee on State Taxation of Interstate Commerce, House Judiciary Committee (88th Cong. 2d Session H.R. No. 1480), Vol. 1, p. 204, *et seq.*

[23] Chestnut Securities Co. v. Oklahoma Tax Commission, 125 F. 2d 571 (C.A. 10th 1942), cert. denied, 316 U.S. 668 (1942); Southern Pacific Company v. McColgan, 68 Cal. App.2d 48, 156 P. 2d 81 (1945); see United Gas Corporation v. Fontenot, 241 La. 488, 129 So. 2d 748 (1961); Pacific Telephone and Telegraph Company v. Franchise Tax Board, 102 Cal. Reptr. 782, 498 P. 2d 1030 (1972).

[24] The Uniform Division of Income for Tax Purposes Act has been adopted by 25 States either *in haec verba* or in substantially the form of the Model Act. (See CCH State Tax Guide, All States ¶10-000). The Multistate Tax Commission has issued advisory regulations which give a sweeping construction to the term "business income". (See P-H, All States Unit ¶6100). Since these regulations have been adopted by a number of States (see Dexter, "Taxation of Income From Intangibles of Multistate and Multinational Corporations," 29 Vand. L. Rev. 401, 404 [1976]), it appears likely that if the decision below is not reversed, many States will seek to apportion the type of dividends involved in the instant case.

business in the taxing State or other States, would be subject to no such risk; its dividends would be taxable by only one State. That is because the Due Process Clause prevents a State from taxing dividends to a foreign corporation not doing business in the State, even though the dividends were derived from the payor corporation's earnings within the State.[25]

Accordingly, if the decision below should be allowed to stand, corporations such as the appellant would be subjected to tax burdens not borne by intrastate commerce.

(f)

If the Commerce Clause doctrine is applied to the diverse methods of attributing foreign source dividend income to the various States so as to preclude multiple taxation, principle, as well as history, points to the recognition of the power of the State of the recipient's commercial domicile to allocate the dividends in toto to its tax. Tested by any accepted fiscal policy on which State income taxation of a corporation is grounded—the source of the income, the benefits and protection afforded, or the costs of the business to the State (see *Curry* v. *McCanless,* 307 U.S. 357, 367-368 [1939])—the claim of the State of commercial domicile to tax in their entirety the dividends of a corporation, all of whose business and activities as a holding and investing company are conducted in that State, is very compelling, whereas the claim of the States in which only manufacturing, selling or other operating functions are carried on to tax the dividends on an apportioned basis is without justification.

---

[25] See Wisconsin v. J.C. Penney Co., 311 U.S. 435 (1940), and Roberts J. dissenting at 448-450; International Harvester Co. v. Wisconsin Dept. of Taxation, 322 U.S. 435 (1944), and Jackson, J. dissenting at 448.

In the opinion below, it was stated that, "[i]f Mobil's Commerce Clause argument prevailed, Mobil and similar corporations could effectively avoid taxation of the majority of their taxable income if the commercial domicile for any reason declined to tax to the full measure of its ability." The statement was presumably based on the fact that New York taxes only a portion of such dividends and some States do not tax them at all. See App. F, p. 37a; and *supra* note 5). The Vermont court has ignored the fact that the franchise or income tax is not the only State tax to which corporations are subject. A proper perspective requires consideration of the entire tax structure of the States and localities involved.

New York has one of the heaviest State and local tax burdens in the country, collecting annual per capita taxes of $1,252, as compared with the median of $749 for all States.[26] Corporations doing business in New York City, where appellant's principal office is located, are subject to both a State and a New York City tax on their net income, to both State and City sales and use taxes and high property and other taxes.[27]

---

[26] The figures are for 1976-1977, the latest available. The New York per capita tax load is the highest in the country, except for Alaska. See "Governmental Finances in 1976-1977," Bureau of Census, U.S. Dept. of Commerce (GF 77, No. 5).

[27] The following table summarizes the major taxes, in addition to property taxes, to which New York City businesses are subject.

Tax	*Rate*
New York State corporation franchise tax on net income (Art. 9-A)	10%
New York City general corporation tax on net income (Ch. 46, Tit. R)	9%
New York City commercial rent and occupancy tax (Ch. 46, Tit. L)	6¾% on rent in excess of $11,000

(table continued on following page)

Moreover, it is the prerogative of the State of commercial domicile to waive taxation, in whole or in part, of dividends properly within its province in order to effectuate its social or economic policies. That should not increase the constitutional power of other States to tax the dividends.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of the appeal.

Dated: February 1, 1979

Respectfully submitted,

JEROME R. HELLERSTEIN
80 Pine Street
New York, New York 10005
(212) 344-1279

JOHN DWIGHT EVANS, JR.
MOBIL OIL CORPORATION
150 East 42nd Street
New York, New York 10017
(212) 883-4965

Attorneys for Appellant

Of Counsel:

WILLIAM B. RANDOLPH
80 Pine Street
New York, New York 10005

Tax	*Rate*
New York State sales and use tax (Art. 28)	4%
New York City sales and use tax (Ch. 46, Tit. A)	4%

The references to New York State taxes are to the New York Tax Law, and the references to New York City taxes are to the City's Administrative Code.

Appendices

Appendix A

(Dated April 11, 1974)

STATE OF VERMONT

DEPARTMENT OF TAXES

Mobil Oil Corporation
Corporate Income Tax
1970, 1971 and 1972

DETERMINATION OF APPEAL

This is a determination of the timely appeal under 32 V.S.A. § 5883 of the taxpayer, Mobil Oil Corporation (Mobil) from the deficiencies assessed by the Vermont Department of Taxes for Corporate Income Taxes covering the years 1970, 1971 and 1972. In addition, the taxpayer has petitioned under 32 V.S.A. § 5833(b) for a modification of the Corporate Income apportioned to Vermont. The deficiencies contested for the years in issue are as follows:

Tax	*Tax paid*	*Additional tax*	*Interest*	*Total*
1970:				
$19,078.56	$4,000.00	$15,078.56	$ 339.27	$15,417.83
1971:				
$31,955.52	$ 750.00	$31,205.52	$ 858.15	$32,063.67
1972:				
$25,384.69	$ 25.00	$25,359.69	$ 443.80	$25,803.49
Totals:				
$76,418.77	$4,775.00	$71,643.77	$1,641.22	$73,284.99

Appendix A

A hearing was held before the Commissioner of Taxes on November 8, 1973 in Montpelier, Vermont. At the hearing the taxpayers presented to the Tax Department a proposed Stipulation of Facts. The Commissioner of Taxes did not sign that proposed Stipulation of Facts. The issues involved for all three years are basically the same with the one difference being in the year 1970 where "gross up" is also at issue. A protest was filed for 1970 and 1971. There was never a hearing on either of these years due to pending litigation involving a different taxpayer on similar issues. However, both years are considered in this determination based on the request of the taxpayer.

FACTS

During the years at issue the taxpayer was a New York corporation with the corporate headquarters at 150 East 42nd Street, New York, New York. The taxpayer files its Corporate Income Tax returns on a calendar year basis ending December 31. For the years in issue Mobil Oil Corporation filed its Vermont Corporate Income Tax return with a reduction of amounts from the Federal Income Tax return reported on line 30 of taxable income which were represented by taxpayer as being nonapportionable income. The amounts not included were represented under the headings of dividends, interest, and foreign taxes. The Vermont departmental auditor adjusted the reported taxable income and restored to the Federal taxable income all of the reductions with the exception of interest on U.S. government obligations. Interest on U.S. government obligations is allowable as a deduction on the Vermont Corporate Income Tax return. In addition, "gross up" was allowed as a deduction for 1971 and 1972 in accord with the 1971 Amendment to 32 V.S.A. § 5811(18). The figures were

Appendix A

ascertained from schedules supporting the Vermont returns and included in the Federal returns. The dividends which had been deducted by the taxpayer included total dividends from both foreign and domestic sources. Interest deducted by Mobil represented amounts termed "non-operating interest".

During the years at issue the taxpayer was engaged in interstate commerce in Vermont and other states throughout the United States and was also engaged in foreign commerce between the United States and various other countries in the world. It is principally engaged in the petroleum business including exploration, production, refining, transportation, distribution and sale of petroleum and petroleum products. In addition, taxpayer conducts petro-chemical, paint and other related operations.

During the years at issue the taxpayer received dividends from both subsidiary and nonsubsidiary corporations. The stock of such corporations was held, managed and controlled entirely outside of Vermont. Allegedly the payment of all dividends was received by the taxpayer outside Vermont. Finally, the taxpayer alleges that the control, use and disposition of the dividends was managed and directed outside Vermont.

A substantial portion of the dividends received by taxpayer were dividends from the Arabian American Oil Company (ARAMCO), a Delaware Corporation in which Mobil has a 10% interest through stock ownership. It is contended that ARAMCO derived all of its operating income from sources outside the United States and, to a substantial extent, in foreign commerce and the conduct of the petroleum business. It is further alleged that ARAMCO conducts no business, owns no property, maintains no office nor has any employees in Vermont and

derived no income from sources in Vermont during the years in issue. ARAMCO maintains offices in the State of New York and the District of Columbia from which certain non-operating functions such as purchase of supplies and equipment and coordination of shareholder and government relations are conducted. Other miscellaneous services are also rendered. The remaining dividends in the years in question were from corporations which conducted no business, owned or leased no property, and maintained no office nor had any employees within either Vermont or the rest of the United States.

Taxpayer makes the following contentions:

A. The amount of taxpayer's Vermont net income apportioned to Vermont does not represent a fair and equitable portion of the taxpayer's income within the meaning of 32 V.S.A. § 5833. The taxpayer contends that the Commissioner of Taxes in his notice of deficiency illegally and erroneously applied the Vermont Income Tax to interest and dividends from sources outside the State of Vermont which did not relate to the taxpayer's business in Vermont and thereby subjected to taxation an unequitable portion of Mobil's net income.

B. Taxation under the Vermont Corporate Income Tax statute violates the Due Process of Law requirement of the Fourteenth Amendment to the Constitution of the United States in that the taxpayer's management of its stock interests in subsidiaries and non-subsidiary corporations, its operations as a holding company and activities as an investor in stocks and obligations take place entirely outside of Vermont. Such activities of the taxpayer are distinct and separable from its business in Vermont; no part of the income derived therefrom is attributable to Vermont;

and inclusion thereof in the apportionment formula constitutes extra-territorial taxation in violation of the Vermont and United States Constitutions.

C. Taxation by Vermont of any part of the dividends and interest violates the Interstate and Foreign Commerce Clauses of the Constitution of the United States (Art. 1, Sec. 8, Cl. 3) for the following reasons:

(1) The tax assessment results in the extra-territorial taxation of taxpayer's income and imposes an undue burden on interstate commerce.

(2) The State of New York in which the taxpayer maintains its commercial domicile has the constitutional power to allocate to that state and tax in full all of the taxpayer's dividends and interest income. The inclusion of such income in the apportionable base therefore subjects the taxpayer to a risk of multiple taxation and to cumulative tax burdens to which corporations conducting exclusively intrastate business in Vermont are not subject. Therefore, such treatment is repugnant to the Commerce Clause.

(3) With regard to the receipt by the taxpayer of dividends and interest from corporations conducting their business in foreign countries, the taxpayer is subject to the power of such countries to tax the dividends and interest without the protection to the taxpayer which the Due Process Clause, Commerce Clause and the other United States constitutional limitations on taxation by the states in this country provide. The inclusion of such income in the apportionment formula imposes a burden on foreign commerce and is repugnant to the Foreign Commerce Clause. The tax as assessed is in conflict with the Federal tax policy embodied in the Federal legislation which is de-

signed not to discourage foreign operations of United States businesses.

D. The apportionment made in the deficiencies does not fairly represent taxpayer's business activity in Vermont for the taxable years in issue and taxpayer has petitioned for modification thereof in accord with 32 V.S.A. § 5833(b).

E. The foreign taxes paid or accrued in the years in issue which were claimed as a credit against the United States Corporation Income Tax should be deductible for purposes of determining Vermont Corporate Income Tax under 32 V.S.A. § 5811(18).

Discussion

I. Whether the Apportionment of Income Formula in Vermont Represents a Fair and Equitable Portion of Taxpayer's Income Subject to Vermont Corporate Income Tax.

Consideration of the Vermont Apportionment Formula must be guided by reference to *F.W. Woolworth* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972). The Court in *Woolworth* stated that where it does not appear the formula of apportionment of the corporate taxpayers income is intrinsically arbitrary, that it operates unreasonably, or violates the constitutional rights of the taxpayer, such apportionment formula is valid. Further, in *Woolworth* the Court found that the statutory formula in Vermont is a three-factor formula which is used by a majority of the states imposing corporate income taxes and is a practical approximation of the distribution of either a corporation's sources of income or the social costs which it generates. The Vermont Supreme Court in the *Woolworth* decision specifically stated at 130 Vt. 544, 549:

> "In its holding the court in *Gulf Oil Corp.* v. *Morrison*, supra, 120 Vt. 330 held the inclusion of dividends in the allocation formula did not serve to make the formula operate in an arbitrary manner.
>
> . . .
>
> This court's approach towards the inclusion of such items of net income as dividends and capital gains in the allocation formula for franchise taxation purposes has been accepted in other jurisdictions. The basic rationale of their inclusion was stated in *F.W. Woolworth Co.* v. *Director, Division of Taxation*, 45 N.J. 466, 213 A.2d 1, 9 (1965) where that court said:
>
> . . .
>
> 'the realistic value of the exercise of a franchise in a particular state is enhanced and contributed to by the worth or income of the entire enterprise. . .'
>
> Typically, this approach is followed where there is unity in use and management of the enterprise being taxed."

While the Court, as a basis for its rationale, was referring to corporate franchise taxes, the actual decision in the *Woolworth* case related to the Corporate Income Tax which is now challenged by Mobil. Thus, the inclusion of dividends in the net income to be apportioned under the three-factor formula is neither arbitrary nor unconstitutional. Similar reasoning applies to the consideration of interest income. See: *In re: United States Steel Corporation* (Idaho Board of Tax Appeals, No. 73-1-20, 1973).

It is settled law that a state which provides an orderly market in which to transact business confers benefits which constitutionally justify the levy of an income tax. *Wiscon-*

sin v. *J.C. Penny Co.*, 311 U.S. 435. The formula for determining income to be taxed is a policy decision for the Legislature. *General Motors* v. *District of Columbia*, 380 U.S. 553 (1965); *Northwestern Cement Co.* v. *Minnesota*, 358 U.S. 450. A heavy burden lies on the party challenging constitutional validity of a tax apportionment formula. It must show by clear and convincing evidence that the use of a particular formula results in the taxation of extra territorial values. *Butler Brothers* v. *McColgan*, 315 U.S. 501 (1942); *Norfolk and Western Railroad* v. *North Carolina*, 297 U.S. 682; *Han's Ree's Sons, Inc.* v. *North Carolina et al. Maxwell*, 283 U.S. 123 (1931).

Finally, in *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1947), the U.S. Supreme Court noted that exact apportionment is not required. A rough approximation rather than precision is sufficient. See also *F.W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 554-556 for the judicial history of the above statements in Vermont. Thus, the three-factor formula to apportion income to the state is the general rule and the exceptions thereto should be used sparingly. See: *Donald M. Draker Co.* v. *Department of Revenue*, 263 Oregon 26, 500 P.2d 1041 (1972). It is clear that the net income of a corporation from exclusively interstate activities is subject to state taxation provided the levy is not discriminatory and the income is properly apportioned. See: *General Motors, Inc.* v. *Colorado*, —— Colo. ——, 509 P.2d 1260 (1973). Further, there exists a presumption in favor of the constitutionality of an apportionment formula which relies on the use of several factors. *General Motors, Inc.* v. *Colorado, supra.* It is clear that Vermont has adopted the three-factor formula and includes dividends and interest in income as amounts to be apportioned by the formula. The inclusion of dividends

and interest in a taxpayer's income for apportionment is perfectly appropriate. Where a taxpayer does business both within and without Vermont, as does Mobil, it is required to determine the portion of its net income apportionable to Vermont under the provisions of 32 V.S.A. § 5833. Further, the Vermont Corporate Income Tax is imposed on income earned or received in a taxable year under 32 V.S.A. § 5832. Certainly, both interest and dividends are clearly includible in "the taxable income of the taxpayer . . . under the laws of the United States" under 32 V.S.A. § 5811(18). Such dividends and interest are therefore includible in Mobil's net income a portion of which is attributable to Vermont. Whether such items are "operating" or "non-operating" type income does not make them any the less items of income. See: *In re: United States Steel Corporation, supra.*

II. Whether There Is a Violation of the Due Process Clause of the Fourteenth Amendment Where Mobil Managed Stock Interests in Subsidiary and Nonsubsidiary Corporations.

Taxpayer contends that its ownership and management of stock interests in subsidiary and nonsubsidiary corporations and its operations as a holding company takes place entirely outside of Vermont. Such activities are alleged to be distinct and separate from Mobil's business in Vermont. Therefore, the inclusion of income derived from such stock ownership in the apportionment formula constitutes extra-territorial taxation in violation of the Fourteenth Amendment. This exact question has already been answered by the Vermont Supreme Court in *F.W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972). The Court stated at 130 Vt. 544, 556 "for this reason we

conclude that the formula as applied to Woolworth is constitutional". So also is the apportionment formula constitutional when applied to the taxable income of Mobil. It is Mobil's total income which is subject to the apportionment formula in Vermont.

III. Whether the Vermont Apportionment Formula Violates Interstate and Foreign Commerce Clauses of the Constitution of the United States (Art. 1, Sec. 8, Cl. 3).

One of the leading cases in this area is *U.S. Glue Co.* v. *Oak Creek*, 247 U.S. 321 (1918), in which the Court held that the State of Wisconsin was entitled to include in the computation of net income, income derived from transportation in interstate commerce. The Court pointed out that a tax on net profits is not a burden on interstate commerce since it does not arise at all unless a gain is shown over and above expenses and losses. The tax cannot be heavy unless the profits are large. Such a tax would constitute one of the ordinary and general burdens of government to which persons and corporations otherwise subject to the jurisdiction of the states are not exempted because they happen to be engaged in commerce among the states. Thus, it appears that there is no burden on interstate commerce by the imposition of the Vermont apportionment formula. For similar reasons there would be no burden on a foreign commerce by the application of the Vermont apportionment formula.

IV. Whether the Vermont Apportionment Formula Fairly Represents the Business Activities of the Taxpayer in Vermont.

As is noted above, the use of the apportionment formula found in 32 V.S.A. § 5833 is accepted in many states with

minor variations throughout the United States and is considered to be the rule rather than the exception. Any diversion from the standard formula imposes a strong burden of proof on the taxpayer to show that the formula does not fairly represent its business activities in the State of Vermont. See: *General Motors, Inc.* v. *Colorado, supra.* Mobil has made no such showing in this case. See: *F.W. Woolworth* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972); *Gulf Oil Corp.* v. *Morrison*, 120 Vt. 324, 144 A.2d 671.

V. Whether Vermont Must Allow Taxpayer to Deduct the Amount of Foreign Taxes That Were Used as a Credit for Federal Taxation Purposes.

In computing Federal Income Tax, a corporation which pays income tax to a foreign country may elect either to deduct the foreign tax paid under 26 U.S.C. § 164, or to credit that amount under 26 U.S.C. § 901 against the tax liability. The § 901 credit is the so-called direct foreign tax credit. In addition, a domestic corporation owning at least 10% of the voting stock of a foreign subsidiary corporation from which it receives its dividends may take a credit under 26 U.S.C. § 902 for the foreign tax paid by the subsidiary on the portion of the subsidiary earnings from which the dividends are paid to the corporation. This is the so-called "deemed paid" foreign tax credit. If the deemed paid credit is not elected, the shareholder includes in income only the amount of the dividend. However, if the deemed paid credit is elected, 26 U.S.C. § 78 requires a shareholder to treat as a dividend the amount equal to the tax it has been deemed to have paid under 26 U.S.C. § 902. Thus, it is apparent that Mobil had an election with regard to foreign taxes paid or deemed paid for federal

purposes. Mobil Oil in the years in issue chose to exercise its election for federal purposes to include foreign taxes paid and taxes deemed paid in gross income and to take the tax credit against its tax liability. Having made the election for federal purposes, Mobil is bound by that election for the determination of the Vermont net income.

Under provisions of 32 V.S.A. § 5832(1), a 6% Income Tax is imposed on the Vermont net income of a corporation for the taxable years which is allocated or apportioned to the state under § 5833. Under the provisions of 32 V.S.A. § 5811(18) "Vermont net income" is defined for corporate taxpayers as the taxable income of a taxpayer for the taxable year under the laws of the United States. For federal purposes, taxable income is determined by establishing a gross income and deducting from that all allowable deductions to arrive at taxable income. There is no provision in the Vermont statute to allow a taxpayer having an election for federal purposes to deduct or to take a credit for taxes to take a credit in the federal case and then for Vermont purposes not take the credit but take the deduction. Again, the Vermont Supreme Court accepts the position that Vermont net income is measured by the taxable income as shown on the federal return. See *F.W. Woolworth Co.* v. *Commissioner of Taxes,* 130 Vt. 544, 554. Accordingly, the taxpayer may not compute taxable income and tax liability one way for federal purposes and another way for Vermont purposes.

CONCLUSION

1. Mobil Oil Corporation must compute Vermont net income based on the Federal net income.

2. The petition of Mobil Oil Corporation to modify the apportionment formula is hereby denied since the apportionment formula in 32 V.S.A. § 5833(a) properly reflects taxpayer's business activity in the State of Vermont.

3. The apportionment formula used for Vermont purposes to determine Corporate Income Tax is constitutional and has been properly applied by the Vermont Department of Taxes.

4. The apportionment formula as applied by the Vermont Department of Taxes to Mobil Oil Corporation does not violate any of the constitutional rights of Mobil Oil Corporation.

5. The question of "gross-up" for 1970 will be determined in accord with the decision of the Vermont Supreme Court in *F.W. Woolworth* v. *Vermont Department of Taxes* which is presently on appeal.

Accordingly, the assessments of the Vermont Department of Taxes must stand affirmed.

Dated this 11th day of April, 1974 at Montpelier, Vermont.

/s/ ROBERT G. LATHROP
Robert G. Lathrop
Commissioner of Taxes

Appendix B

Order filed January 7, 1977
Beverly J. Smith, Clerk
Final Order filed June 10, 1977

WASHINGTON SUPERIOR COURT

DOCKET No. C13-74 Wnm

STATE OF VERMONT,
WASHINGTON COUNTY, SS.:

MOBIL OIL CORPORATION

VS.

COMMISSIONER OF TAXES

ORDER

This is an appeal by Mobil Oil Corporation, hereinafter referred to as plaintiff, from the decision of Robert G. Lathrop, Commissioner of Taxes for the State of Vermont, hereinafter referred to as defendant, denying plaintiff relief from deficiencies assessed with respect to its 1970, 1971 and 1972 Vermont Corporate Income Taxes; and also denying plaintiff's petition for modification of the Vermont Apportionment of Income Formula.

This cause has been submitted for determination upon the record compiled before the defendant, including a sworn statement of facts submitted by plaintiff in lieu of testimony; the representations of counsel; and the pertinent authorities.

Appendix B

During the subject years, plaintiff was a New York corporation, with its headquarters at New York City, and it was registered to do business in Vermont. It was engaged in the exploration for and the production, refining, transportation, distribution and sale of petroleum and related products in the United States; it conducted petrochemical coatings, plastic and phosphate mining businesses; and it directly or indirectly owned capital stock of numerous foreign subsidiary and five percent or more of certain domestic and foreign nonsubsidiary corporations. All of plaintiff's interests were held, controlled and managed outside the State of Vermont and its activities within this jurisdiction were restricted solely to the wholesale and retail marketing of petroleum products.

Plaintiff filed its federal and Vermont income tax returns on a calendar year basis. During the subject years, on the Vermont returns, it reduced the amounts reported on the federal returns for foreign source dividends and interest income received during all years and a 26 U.S.C. 78 "gross up" for 1970. The Department of Taxes restored all of the reductions with the exception of interest on United States obligations. While the "gross up" for 1970 was included, they were allowed as deductions in 1971 and 1972, and defendant has agreed to modify it for the year 1970, in a manner consistent with the decisions in *F.W. Woolworth Company* v. *Commissioner of Taxes* (1974) 133 Vt. 93, and *In re Goodyear Tire and Rubber Company* (1975) 133 Vt. 132.

There are no issues of fact for determination. The legal issues presented largely have been answered by the Vermont Supreme Court in *In re Goodyear Tire and Rubber Company*, supra, *F.W. Woolworth Company* v. *Commissioner of Taxes*, supra; and *F.W. Woolworth Company* v.

Commissioner of Taxes (1972) 130 Vt. 544, and the principles established in those decisions are binding.

However, because the commercial domicile of plaintiff does have the authority to tax investment dividends and interest without apportionment; because the capacity to tax, and not the actual imposition of same, is the test, such income could be the subject of prohibitive multiple taxation by inclusion in the Vermont apportionment base. (See Plaintiff's Reply Brief, cases cited).

Therefore, this cause is remanded for determination of that issue, and adjustment relative to the 1970 gross up.

Dated at Montpelier, Vermont, this 6th day of January 1977.

/s/ JOHN P. MORRISSEY

/s/ WILLIS C. BRAGG

/s/ MARILYN M. DURANKAU

Judges, Washington Superior Court

SUPERIOR COURT—WASHINGTON COUNTY

Civil Action, Docket No. C13-74 Wnm

STATE OF VERMONT,
WASHINGTON COUNTY, SS.:

MOBIL OIL CORPORATION

v.

COMMISSIONER OF TAXES

FINAL ORDER

This cause came on before the Washington Superior Court upon the parties' June 8, 1977, Stipulation for Final Order. Upon consideration of the Stipulation for Final Order, the record before this Court, and the representations and arguments of counsel, it is hereby

ORDERED, that the Interlocutory Order in this action, dated January 6, 1977, be and it hereby is adopted as the final order of this Court; and it is further

ORDERED, that the Appellant's Vermont Corporate Income Tax liability for the years 1970, 1971, and 1972 be and it hereby is determined in accordance with the re-computation contained in the Stipulation for Final Order, with resulting tax liability as follows:

1970	$2,923.26
1971	1,207.64
1972	25.00

Appendix B

Dated at Montpelier, Vermont this 9th day of June 1977.

/s/ JOHN P. MORRISSEY

/s/ WILLIS C. BRAGG

/s/ MARILYN M. DURANKAU

Judges, Washington Superior Court

Approved as to form and substance:

MOBIL OIL CORPORATION

By: /s/ DOUGLAS C. PIERSON
Douglas C. Pierson, Esq.

By: /s/ JEROME R. HELLERSTEIN
Jerome R. Hellerstein, Esq.

Attorneys for the Appellant

/s/ RICHARD JOHNSTON KING

Appendix C

(Filed in Clerk's Office November 9, 1978)

No. 160-77

On Appeal From
Washington Superior Court

June Term, 1978

COMMISSIONER OF TAXES

v.

MOBIL OIL CORPORATION

Present:

Barney, C.J., Daley, Larrow, Billings, and Hill, JJ.

BILLINGS, J. The Commissioner of Taxes (Commissioner) appeals from a final order of the Washington Superior Court redetermining defendant-appellee Mobil Oil Corporation's (Mobil's) income tax liability to the State of Vermont for the years 1970 through 1972 inclusive. The superior court determined that the Commissioner's application of the Vermont corporate income tax to certain of Mobil's dividend and interest income offended the Commerce Clause of the United States Constitution. We reverse.

Vermont imposes an annual apportioned net income tax on corporations authorized to do business within the state or receiving income allocable to Vermont because of business activity within the state. 32 V.S.A. §§ 5811(15), 5831-33. The application of this tax involves a number of steps. Once it has been ascertained that a corporation is a taxable

Appendix C

corporation, 32 V.S.A. § 5811(15), the corporation's tax base is determined. The tax base is defined in 32 V.S.A. § 5811(18) as "the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states." The income items here disputed are not so exempt. The statute applies the misleading term "Vermont net income" to the income base against which the tax is assessed. The term might seem to indicate that the tax base is composed only of income allocable to business activities within the state, when in fact the term refers to a corporation's total net income before any allocation.

The allocation is a distinct step in the process of determining the corporation's tax liability to Vermont. 32 V.S.A. § 5833(a) establishes a procedure for apportioning the net income of a corporation engaging in activity both within and without the state to allocate to Vermont an equitable portion of that income upon which to lay its tax. The computation mandated by the statute seeks to determine the fraction of a corporation's net income derived from its Vermont business activity and utilizes a three factor formula. The value of all of the corporation's Vermont real and tangible property is expressed as a percentage of the value of the corporation's real and tangible property wherever located. The same process is repeated for Vermont payroll and sales. The arithmetic average of these percentages is then determined, yielding an apportionment factor. This apportionment factor multiplied by the corporation's total net income determines the apportioned tax base. It is upon this apportioned net income reflecting net income allocable to business activity within Vermont's borders that Vermont assesses the tax in question.

Appendix C

Mobil is a New York corporation engaged in interstate and foreign commerce. In each of the years in question, Mobil received a large portion of its taxable income in the form of dividends from foreign subsidiary corporations and from domestic subsidiary and non-subsidiary corporations. Also, in each relevant year, Mobil received a small percentage of its income in the form of interest. These two sources of income will be referred to hereinafter as investment income. All other taxable income will be referred to hereinafter as operating income.

Mobil does not claim that it was not a taxable corporation during the years in question, nor does Mobil argue that the apportionment formula resulted in too great a percentage of its tax base being subject to taxation in this state. Rather, Mobil objects to its investment income being included in its Vermont tax base at all. Mobil filed tax returns during each of the years in question, determining its tax base by applying the apportionment factor, reckoned according to the statute, to operating income only. That is, in determining its "Vermont net income" for each year, Mobil took its net income for federal income tax purposes and reduced this figure by amounts representing dividend and interest income. This is not authorized by law, and upon audit the Vermont Department of Taxes added the amounts back in and assessed deficiencies.

Mobil appealed the deficiencies to the Commissioner under the provisions of 32 V.S.A. § 5833(b). A hearing was held at which time Mobil asserted that the assessments violated the terms of the tax statute, 32 V.S.A. § 5833, the Due Process Clause of the Fourteenth Amendment, and the Interstate and Foreign Commerce Clause of Article I, Section 8 of the United States Constitution. The Commissioner

rejected all grounds of invalidity asserted and affirmed the action of the Department of Taxes.

Upon appeal, the superior court reversed on the sole ground that the tax as applied violated the prohibition against multiple taxation contained in the Commerce Clause. As the superior court correctly noted in its order, the legal questions concerning apportionment and due process had already been answered adversely to Mobil's contentions by recent decisions of this Court. *In re Goodyear Tire and Rubber Co.*, 133 Vt. 132, 335 A.2d 310 (1975); *F.W. Woolworth Co.* v. *Commissioner of Taxes*, 133 Vt. 93, 328 A.2d 402 (1974); *F.W. Woolworth Co.* v. *Commissioner of Taxes*, 130 Vt. 544, 298 A.2d 839 (1972); *Gulf Oil Corp.* v. *Morrison*, 120 Vt. 324, 141 A.2d 671 (1958).

The single question presented here is: Does Vermont's application of its apportioned net income tax to the investment income in issue constitute multiple taxation prohibited by the Commerce Clause?

Mobil's argument that Vermont's tax would impose an unconstitutional burden on interstate commerce involves a number of propositions. The first is that taxes subjecting interstate businesses to a risk of multiple taxation not borne by intrastate business violate the Commerce Clause. The next is that the test of multiple taxation is the power of other jurisdictions to tax rather than the exercise of that power. The last is that the state of a corporation's commercial domicile, in Mobil's case New York, has the constitutional power to tax its corporation's dividend and interest income without apportionment. Mobil argues that if New York has the authority to tax all of Mobil's investment income, there is a risk that it will do so. If Vermont's tax upon a portion of the same income is sustained, there then will be a risk of multiple taxation. If the mere existence of

the power is the constitutional test, then an impermissible burden would be shown by establishing New York's right to tax without apportionment. There is no allegation that New York presently taxes or intends to tax this investment income on an unapportioned basis, and so, no double taxation in fact is alleged. Mobil asks us to hold that the possibility that New York may so tax prevents Vermont and every other state from laying even a properly apportioned tax upon this investment income.

The burden is upon the taxpayer to demonstrate a risk of multiple taxation. *Standard Pressed Steel Co.* v. *Washington Revenue Department*, 419 U.S. 560, 563 (1975); *General Motors Corp.* v. *Washington*, 377 U.S. 436, 449 (1964).

Mobil in the case at bar has not established that its commercial domicile can tax the investment income of its domiciliary corporation without apportionment. Mobil claims that this proposition is "well established," but only cites four cases in support of its claim. *Chestnut Securities Co.* v. *Oklahoma Tax Commission*, 125 F.2d 571 (10th Cir. 1942), *cert. denied*, 316 U.S. 668 (1942); *Pacific Telephone and Telegraph Co.* v. *Franchise Tax Board*, 7 Cal.3d 544, 498 P.2d 1030, 102 Cal. Rptr. 782 (1972); *Southern Pacific Co.* v. *McColgan*, 68 Cal.App.2d 48, 156 P.2d 81 (1945); *United Gas Corp.* v. *Fontenot*, 241 La. 488, 129 So.2d 748 (1961). Two of these four were decided more than thirty years ago, when apportionment was not looked upon as favorably as it is today. All of the cases construed statutes very different from the apportioned net income tax here in issue. Only the *United Gas* opinion mentioned the Commerce Clause. The Louisiana Supreme Court there held only that the commercial domicile could tax the income from its corporation's intangibles "unless it is established by the evidence [that] such taxation does, in fact, place an

undue burden on interstate commerce." *United Gas Corp.* v. *Fontenot, supra,* 241 La. at 510, 129 So.2d at 756. Whether or not an undue burden upon interstate commerce exists, is, of course, the precise point in issue in this case, and on this point the *United Gas* case is no authority. Congress or the United States Supreme Court may ultimately have to decide on the power of the states to tax on such a basis, but neither has done so yet.

We do not decide this issue in the case at bar since Mobil has failed to establish on the record that New York has the power to tax investment income without apportionment, and hence no risk of multiple taxation is here shown. A number of recent decisions of the United States Supreme Court imply that the issue would be decided by requiring that taxation of investment income of corporations engaged in interstate commerce be on an apportioned basis, rather than by permitting the commercial domicile to tax such income to the exclusion of all other jurisdictions. *Moorman Manufacturing Co.* v. *Bair,* —— U.S. ——, 98 S.Ct. 2340 (1978); *Washington Revenue Department* v. *Washington Stevedoring Companies,* —— U.S. ——, 98 S.Ct. 1388 (1978); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959).

The United States Supreme Court at one time took the view that the Commerce Clause creates an area of free trade around interstate commerce such that the states cannot tax such commerce at all. *Freeman* v. *Hewitt,* 329 U.S. 249 (1946). But this doctrine had always been subject to exceptions. One line of cases drew a distinction between indirect taxation of interstate commerce through taxation of local incidents of that commerce and direct taxation of interstate commerce itself, only the latter being impermissible. Although it was recognized that the most effective

way to safeguard the policies embodied in the Commerce Clause would be to prohibit all burdens on interstate commerce, it was also realized that all interstate commerce was carried on within the several states, imposing burdens on the states for which they should be compensated. *Western Live Stock* v. *Bureau of Revenue,* 303 U.S. 250 (1937) states:

> It was not the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the costs of doing the business. 'Even interstate business must pay its way.' [Citations omitted].

In recent times, the free trade view has been subject to dramatic erosion. As the revenue needs of the states were recognized to be both legitimate and large, more and more incidents of interstate commerce were accepted by the court as local and hence taxable without offending the Commerce Clause. In 1959, the Supreme Court directly held that net income from interstate operations of foreign corporations may be subjected to state taxation on an apportioned basis. *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450 (1959). More recently the Court has permitted a direct tax on the privilege of conducting interstate business. *Washington Revenue Department* v. *Association of Washington Stevedoring Companies,* —— U.S. ——, 98 S.Ct. 1388 (1978); *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274 (1977).

When the Commerce Clause was interpreted to permit taxation of only local incidents of interstate commerce, the danger of multiple taxation was handled within that doctrine. A state could only reach monies generated by activity which bore a special relation to the taxing state. No other

state could tax the same monies because the necessary special relation was lacking. As the states began laying broad taxes on gross receipts not tied to a geographical area or taxes on net income, the Court increasingly sanctioned the use of apportionment formulas to insure that extra-territorial values were not taxed and to guard against multiple taxation. If a jurisdiction is taxing according to the amount of business activity within its borders, that is, if the tax is fairly apportioned, there can be no multiple taxation. *Northwestern Portland Cement Co.* v. *Minnesota, supra,* 358 U.S. at 462. Many states employ different formulas to arrive at their apportioned shares. Some overlap, and therefore multiple taxation may result. This threat is inherent in any system where state apportionment formulas are nonuniform. But in *Moormon Manufacturing Co.* v. *Blair,* —— U.S. ——, 98 S.Ct. 2340 (1978), it was held that a state does not offend the Commerce Clause by having an apportionment formula different from that of its neighbors. See *State Taxation Under the Commerce Clause: An Historical Perspective,* 29 Vand. L. Rev. 335, 347 (1976) by Jerome R. Hellerstein.

In *Washington Stevedoring, supra,* the Court explicitly stated that it was engaging in a balancing analysis in determining Commerce Clause disputes, weighing the burden imposed on interstate commerce by a given tax measure against the state's "significant interest in exacting from interstate commerce its fair share of the cost of state government."

> All tax burdens do not impermissibly impede interstate commerce. The Commerce Clause balance tips against the tax only when it unfairly burdens commerce by exacting more than a just share from the interstate activity.

Washington Stevedoring, supra, —— U.S. at ——, 98 S.Ct. at 1398 (1978).

An attempt on the part of New York to tax investment income without apportionment would tip the balance by subjecting to taxation more than New York's just share. *Washington Stevedoring* made it clear that apportionment was not simply a limiting device to prevent duplicative taxation. Apportionment should operate in such a way that each state the commerce touches will be allocated a proportion of an entity's tax base sufficient to yield a fair contribution toward the cost of running state government. What is a fair contribution will depend upon the benefits conferred upon the entity and the costs imposed by it upon the state by reason of its carrying on business within the state. See *General Motors Corp.* v. *Washington, supra,* 377 U.S. at 441. Vermont has the necessary nexus with Mobil and provides sufficient benefits to be able to lay an apportioned tax on Mobil's investment income along with its operating income. *F.W. Woolworth Co.* v. *Commissioner of Taxes,* 130 Vt. 544, 298 A.2d 839 (1972).

In a conflict between Vermont's apportioned tax on Mobil's investment income and an attempt on New York's part to tax that same income without apportionment, New York might very well have to yield. *Johns-Manville Products Corp.* v. *Commissioner of Revenue Administration,* 115 N.H. 428, 430-31, 343 A.2d 221, 223 (1975); *appeal dismissed for want of a substantial federal question,* 423 U.S. 1069 (1976). Mobil has not sustained its burden of showing that the Commerce Clause was violated by Vermont's properly apportioned income tax.

There are practical considerations that reinforce this conclusion. Mobil receives by far the majority of its taxable income in the form of investment income here sought

to be insulated from taxation by all but one state. The record shows that in 1971 the federal taxable dividends of Mobil made up 92% of its federal taxable income, while in 1972 they equalled 125% of taxable income. The amount in excess of 100% in the latter year was offset by losses and deductions allowed in computing Mobil's federal income tax for that year.

If the investment income was not includable in the Vermont tax base, in 1971, Mobil would have to pay a tax on Vermont's apportioned share of 8% of its taxable income, while in 1972, Mobil would only owe a total of $25.00, the minimum tax. We have already decided that corporations engaged in business within the state receive protections and derive benefits according to the entire income of the corporation. *F.W. Woolworth Company* v. *Commissioner of Taxes, supra,* 130 Vt. at 549, 298 A.2d at 841 (1972). If Mobil's Commerce Clause argument prevailed, Mobil and similar corporations could effectively avoid taxation of the majority of their taxable income if the commercial domicile for any reason declined to tax to the full measure of its ability. The states would be frustrated in their attempts to recoup the costs imposed upon them by foreign corporations merely because interstate commerce was being done. This, in our view, would be a perverse use of the Commerce Clause.

The recent decisions of the Supreme Court, which recognize the revenue needs of the states and seek to put Commerce Clause jurisprudence on a practical footing, require no such result. The Court has said repeatedly that where a state tax is fairly apportioned, not discriminatory, related to state services provided, and where the entity taxed has a substantial nexus to the taxing state, the Court will not void the tax on Commerce Clause grounds on an argument that

is an abstraction or is based on mere speculation. That is, where the tax is of a type that is not inherently burdensome, the Court is requiring proof in the record of multiple taxation and not merely the argument that such hypothetically could occur. *Moorman Manufacturing Co.* v. *Bair,* —— U.S. ——, ——, 98 S.Ct. 2340, 2346 (1978); *Complete Auto Transit, Inc.* v. *Brady,* 430 U.S. 274, 278 (1977); *General Motors Corp.* v. *Washington,* 377 U.S. 436, 449 (1964); *Northwestern States Portland Cement Co.* v. *Minnesota,* 358 U.S. 450, 462-63 (1959).

Decree of the Washington Superior Court is reversed; cause remanded, and by that court to be further remanded to the Commissioner of Taxes for action under 32 V.S.A. § 5833 and a reassessment of Mobil Oil Corporation's income taxes for the years 1970-1972, inclusive.

FOR THE COURT:

/s/ FRANKLIN S. BILLINGS, JR.
Associate Justice

Appendix C

SUPREME COURT

FORM No. 1

ENTRY ORDER

SUPREME COURT DOCKET No. 160-77
June Term, 1978.

VT. SUPREME COURT
FILED IN CLERK'S OFFICE

NOV 9—1978

APPEALED FROM:

Washington Superior Court

DOCKET No. .....

COMMISSIONER OF TAXES

v.

MOBIL OIL CORPORATION

In the above entitled cause the Clerk will enter:

Decree of the Washington Superior Court is reversed; cause remanded, and by that court to be further remanded to the Commissioner of Taxes for action under 32 V.S.A. § 5833 and a reassessment of Mobil Oil Corporation's income taxes for the years 1970-1972, inclusive.

Appendix C

FOR THE COURT:

/s/ FRANKLIN S. BILLINGS, JR.
FRANKLIN S. BILLINGS, JR.
Associate Justice
Concurring

/s/ ALBERT W. BARNEY
ALBERT W. BARNEY
Chief Justice

/s/ RUDOLPH J. DALEY
RUDOLPH J. DALEY
Associate Justice

/s/ ROBERT W. LARROW
ROBERT W. LARROW
Associate Justice

/s/ WILLIAM C. HILL
WILLIAM C. HILL
Associate Justice

Appendix D

(Filed January 19, 1979)

WASHINGTON COUNTY SUPERIOR COURT

Josephine A. Alexander, *Clerk*

IN THE WASHINGTON SUPERIOR COURT
OF THE STATE OF VERMONT

Docket No. C-13074 Wnm

MOBIL OIL CORPORATION

v.

COMMISSIONER OF TAXES

NOTICE OF APPEAL TO THE SUPREME
COURT OF THE UNITED STATES

Notice is given that Mobil Oil Corporation hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of Vermont, holding that the Vermont income tax may be applied to Mobil Oil Corporation's dividend income derived from earnings outside the United States, entered in this cause on November 9, 1978, reversing the decision of the Washington Superior Court.

This appeal is taken pursuant to 28 U.S.C. § 1257(2).

Appendix D

DATED: New York, New York
January 17, 1979

/s/ JEROME R. HELLERSTEIN
Jerome R. Hellerstein
80 Pine Street
New York, New York 10005
(212) 344-2040

/s/ JOHN DWIGHT EVANS, JR.
John Dwight Evans, Jr.
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
(212) 883-4965
Attorneys for
Mobil Oil Corporation

Both of the undersigned are members of the Bar of the Supreme Court of the United States and hereby certify that on this 17th day of January 1979, three copies of the Notice of Appeal to the Supreme Court of the United States were mailed, with airmail postage prepaid to:

M. Jerome Diamond, Attorney General
Edwin Hobson, Assistant Attorney General
Harriet King, Commissioner of Taxes

at their offices at:

Pavilion Office Building
109 State Street
Montpelier, Vermont 05602

We further certify that all parties required to be served have been served.

Appendix D

Dated: New York, New York
January 17, 1979

/s/ JEROME R. HELLERSTEIN
Jerome R. Hellerstein
80 Pine Street
New York, New York 10005
(212) 344-2040

/s/ JOHN DWIGHT EVANS, JR.
John Dwight Evans, Jr.
Mobil Oil Corporation
150 East 42nd Street
New York, New York 10017
(212) 883-4965
Attorneys for
Mobil Oil Corporation

Appendix E

STATUTES

Vermont Statutes Annotated, Title 32:

Section 5811 (18). "Vermont net income" means, for any taxable year and for any corporate taxpayer, the taxable income of the taxpayer for that taxable year under the laws of the United States, excluding income which under the laws of the United States is exempt from taxation by the states. However, "Vermont net income" shall not include the "gross-up dividends" required by the federal Internal Revenue Code to be taken into taxable income in connection with the taxpayer's election of the foreign tax credit. In the case of an "electing small business corporation" ("Subchapter S Corporation") under the laws of the United States, "Vermont net income" shall include only the taxable income of the corporation which is distributed to, or is undistributed to but allocable under the laws of the United States to, shareholders during the time while they are not residents of the state of Vermont. (Am. L. 1971, A. 73.)

. . .

Section 5833. Allocation and apportionment of income—(a) If the income of a taxable corporation is derived from any trade, business, or activity conducted entirely within this state, the Vermont net income of the corporation shall be allocated to this state in full. If the income of a taxable corporation is derived from any trade, business or activity conducted both within and without this state, the amount of the corporation's Vermont net income which shall be apportioned to this state, so as to allocate to this state a fair and equitable portion of that income, shall be determined by multiplying that Vermont net income by the arithmetic average of the following factors:

Appendix E

(1) The average of the value of all the real and tangible property within this state (A) at the beginning of the taxable year and (B) at the end of the taxable year, (but the commissioner may require the use of the average of such value on the fifteenth or other day of each month, in cases where he determines that such computation is necessary to more accurately reflect the average value of property within Vermont during the taxable year), expressed as a percentage of all such property both within and without this state; (Am. L. 1971, c.73.)

(2) The total wages, salaries, and other personal service compensation paid during the taxable year to employees within this state, expressed as a percentage of all such compensation paid whether within or without this state.

(3) The gross sales, or charges for services performed, within this state, expressed as a percentage of such sales or charges within or without this state.

(b) If the application of the provisions of this section does not fairly represent the extent of the business activities of a corporation within this state, the corporation may petition for, or the Commissioner may require, with respect to all or any part of the corporation's business activity, if reasonable: (1) Separate accounting; (2) The exclusion or modification of any or all of the factors; (3) The inclusion of one or more additional factors which will fairly represent the corporation's business activity in this state; or (4) The employment of any other method to effectuate an equitable allocation and apportionment of the corporation's income. (Am. L. 1971, A. 73.)

Appendix F

ALLOCATION OR APPORTIONMENT OF DIVIDENDS INCLUDED IN THE TAX BASE*

State[1]	All Taxable Dividends Allocated to Commercial Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
Alabama		X	
Alaska		X	
Arizona	X		

* This table includes only jurisdictions which include foreign source dividends, in part or in whole, in the tax base. Georgia, Florida and Ohio have been omitted because foreign source dividends are not taxable (Ga. Code §92-3102, CCH 10-512, 11-512), or they are taxable only if the payor transacts a substantial portion of its business, or has a substantial portion of its assets, in the United States (Fla. Stat. §220.13, CCH 10-310), or has physical assets located in the State (Ohio Rev. Code Ann. §5733, CCH 10-309, 336, 378, 11-425).

1. Ala. Code Tit. 40, §40-18-34, CCH 10-535, 15-090; Alaska Stat. §§43.19.010, 43.20.065. CCH 12-417, 418; Ariz. Rev. Stat. §43-135(g), CCH 12-405; Ark Stat. Ann. §§84-2055(a), 2058, 2061, 2063, CCH 11-537, 572; Cal. Rev. & Tax. Code, §25126, CCH 12-428; Colo. Rev. Stat. §24-60-1301, CCH 12-538; Del. Code Tit. 30, §1903(b)(6), CCH 10-840; D.C. Code §47-1580(a), CCH 12-405, 413; Haw. Rev. Stat. §§235-22, 27, 29, CCH 12-530, 540; Idaho Code §63-3027(g), (i), CCH 12-490, 510; Ill. Rev. Stat. Ch. 20, §301, 304, CCH 90-907, 916; Ind. Code Ann. §6-3-2-2, CCH 12-405, 415, 448; Kan. Stat. §§79-3274, 3277, 3279, CCH 12-478, 490; La. Rev. Stat. Ann. §243, CCH 12-411; Me. Rev. Stat. Tit. 36, §§5211(6), (8), CCH 12-460, 465; Md. Ann. Code Art. 81, §316(c), CCH 12-410, 420; Mass. Gen. Laws Ann. Ch. 63, §38(a)(1), (c) CCH 10-324, 330; Minn. Stat. §290.17, CCH 12-407; Miss. Code Ann. §27-7-23(1)(a); Miss. Inc. Tax Reg. §1.27-7-23(1), CCH 12-405, 407, 435; Mont. Rev. Codes Ann. §84-1503, CCH 11-501(c), (f), (h); Neb. Rev. Stat. §77-2735(4), 2741, 2743, CCH 12-425, 445, 455; N.H. Rev. Stat. Ann. §77-A:3, CCH 15-350, 355; N.J. Rev. Stat. §54:10A-6, CCH 5-805, 810; N.M. Stat. Ann. §§72-15A-20, 23, CCH 12-425, 455, 465; N.C. Gen. Stat. §105-130.4(c), (f), (i), CCH 10-805, 820; N.D. Cent. Code §57-38.1, CCH 12-454, 460, 464; Okla. Stat. Tit. 68, §2358A, CCH

Appendix F

State	All Taxable Dividends Allocated to Commercial Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
Arkansas		X	
California	X		
Colorado		X	
Delaware			X
District of Columbia		X	
Hawaii		X	
Idaho		X	
Illinois		X	
Indiana		X	
Kansas		X	
Louisiana	X		
Maine		X	
Maryland			X
Massachusetts			X
Minnesota	X		
Mississippi	X		
Montana		X	
Nebraska		X	
New Hampshire			X
New Jersey			X

12-425; Or. Rev. Stat. §314.625, 640, 650, CCH 12-414, 418, 422; R.I. Gen. Laws §44-11-14, CCH 10-810; S.C. Code §12-7-1120, CCH 12-435; Tenn. Code Ann. §67-2709, 2712, 2714, CCH 12-419, 425, 429; Utah Code Ann. §59-13-81, 84, 86, CCH 11-515, 530, 540; Vt. Stat. Ann. Tit. 32, §5833(a), CCH 12-410; Wis. Stat. Ann. §71.07(1m)(2), CCH 12-404(a), 409. All CCH references are to the relevant paragraphs in the Commerce Clearing House, Inc. State Tax Reporter Service.

Appendix F

State	All Taxable Dividends Allocated to Commercial Domicile	Non-Business Dividends Allocated to Commercial Domicile and Business Dividends Apportioned	All Taxable Dividends Apportioned
New Mexico		X	
North Carolina		X	
North Dakota		X	
Oklahoma	X		
Oregon		X	
Rhode Island			X
South Carolina	X		
Tennessee		X	
Utah		X	
Vermont			X
Wisconsin			X
Total[2]	7	19	8

2. Four States that tax foreign source dividends have been omitted from the table because their methods of allocation or apportionment do not fit into the scheme used by most States.

Connecticut: Allocates dividends from subsidiaries by reference to the ratio of the payor's business done in the State; non-subsidiary dividends are apportioned if they constitute an integral part of the recipient's regular business operations (Conn. Gen. Stat. §12-218, CCH 10-815, 825).

Iowa: There appears to be a conflict between the statute and the rules as to the extent to which dividends are allocated or apportioned (Iowa Code §422.33, CCH 12-520; Iowa Rule 54.2(1), CCH 12-522).

New York: Includes in the tax base only non-subsidiary dividends (to the extent of 50%), which it allocates in the ratio of the payor's New York apportionment percentages (N.Y. Tax Law §210, CCH 5-829—841, 9-581).

Virginia: Dividends of non-subsidiaries are allocated to the State if it is the recipient's commercial domicile; dividends paid by subsidiaries are apportioned (Va. Code §58-151.040, CCH 12-445).